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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/743,648	12/22/2003	Rick T. Swartzburg		7275

7590 07/26/2005

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EXAMINER

TRETTEL, MICHAEL

ART UNIT PAPER NUMBER

3673

DATE MAILED: 07/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/743,648

Applicant(s)

SWARTZBURG, RICK T.

Examiner

Michael Trettel

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 May 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,4,5,9,15 and 16 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 15 and 16 is/are allowed.
- 6) ☒ Claim(s) 1,4 and 9 is/are rejected.
- 7) ☒ Claim(s) 5 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- 1) ☐ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The applicant should note that Claim 8 is not mentioned in the listing of claims in the Amendment. On page 6 of the response it is listed as being cancelled.

Claim Rejections - 35 USC § 102

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Landvik et al (US 6,159,574). Landvik et al shows a laminated foam body support that in one embodiment shown in Figures 2 and 6 takes the form of a mattress topper or overlay. The overlay comprises at least a relatively thick base layer 3 of foam with a hardness of 13N, and a relatively thin top layer 4 made of foam with a hardness of 10N. The layers can be made from a viscoelastic foam, although the use of polyurethane foam is mentioned as well. The top layer is less firm (i.e., softer) than the base layer, and as set forth in column 2, lines 36 to 49 the laminated foam layers can be used as a mattress overlay upon a conventional mattress. The overlay is inherently capable of being flipped over to present a harder upper surface if so desired, and as such the claim limitations set forth in claims 10, 12, and 13 which are drawn to an inferentially claimed mode of use are anticipated by the Landvik et al reference. Note the methods of use set forth in column 2, lines 36 to 38 and column 3, lines 63 to 67. With respect to the limitations added to claim 1, the examiner submits that Landvik does meet these limitations. The pad has two firmnesses available, with the user in Landvik selecting one of the two firmnesses, i.e., the softer

firmness presented by the top layer 4. This can be considered to be for the purpose of obtaining a preferred firmness. The user then places the pad upon a mattress with the layer 4 facing upwardly.

Claim Rejections - 35 USC § 103

Claims 4 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Landvik et al (US 6,159,574). The particular foam ILDs and densities claimed are well within the ordinary level of skill in the art, since the applicant has not shown any particular criticality is associated with the parameters set forth in claims 4 and 9 these claims are considered to be obvious in view of the Landvik et al reference.

Response To Arguments

Applicant's arguments filed April 26, 2005 have been fully considered but they are not persuasive. The argument regarding Claim 1 has been addressed in the rejection. In response to applicant's arguments regarding the limitations present in claims 4 and 9, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references or a modification of the base reference. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The applicant has also argued that modifying the Landvik reference as proposed by the examiner would destroy the functionality of the device, since this would change the principles of operation of the support and render the invention unsatisfactory for its intended purpose. This argument is unpersuasive since it is offered without any proof of the above, it is

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hard to see why changing the densities of the foam materials used in Landvik's mattress would make it unusable as a body support. The applicant has also argued that these particular parameters used (the use of 4/5 lb density foams) produce a topper having "very unique properties", yet no proof or evidence of such is presented. A mere allegation of criticality is insufficient-some evidence should be presented showing how or why these parameters produce a body support that has unexpected results in use. Finally, the examiner notes that on page 9, lines 14 and 19 the applicant admits that these parameters were arrived at through "extensive testing" and/or are a "testing-derived optimal topper configuration". Regardless of how difficult and timely the testing was, this appears to be an admission that these parameters were arrived at through a process of routine experimentation-which is within the ordinary level of skill in the art.

The §103(a) rejection based upon Barman in view of Landvik et al has been dropped as a result of the applicant's amendments and arguments regarding this rejection. No further comments regarding this rejection are necessary.

Allowable Subject Matter

Claims 15 and 16 are allowed.

Claim 5 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Trettel whose telephone number is (571) 272-7052. The examiner can normally be reached on Monday, Tuesday, Thursday, or Friday from 7.30 am to 5.00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Heather Shackelford, can be reached on (571) 272-7052. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

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A handwritten signature in dark ink, appearing to read "Michael Trettel", with a long horizontal flourish extending to the right.

Michael Trettel
Primary Examiner
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